UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF INDIANA

In Re	)	
	)	In Bankruptcy
EUROMOTORSPORT RACING, INC.	)	
	)	Case No. 94-04503-RLB-11
Debtor.	)	

O P I N I O N

This matter is before the Court on the Final Application for Allowance of Compensation and Reimbursement of Expenses filed by Ancel & Dunlap ("A&D") and the Objection thereto filed by The Plan Committee. A&D, Debtor's counsel in this case, seek payment of fees in the amount of $142,307.00 and reimbursement of expenses in the amount of $9,556.40.

On June 15, 1994, an involuntary Chapter 7 bankruptcy petition was filed against Euromotorsport Racing, Inc. ("Debtor"). On July 27, 1994, the case was converted to a Chapter 11 proceeding. On August 3, 1994, A&D entered its appearance as counsel for the Debtor. On October 28, 1994, A&D filed Debtor's Application to Employ Counsel. On November 14, 1994, this Court entered an Order appointing A&D as counsel for the Debtor. A&D has previously filed an Application for Compensation for services provided from the time of its appointment as Debtor's counsel until August 25, 1995. By Order of this Court dated December 27, 1995, A&D was awarded fees in the amount of $125,000.00 and expenses in the amount of $5,307.22. The Final Application, which is presently before the Court, relates to services rendered and expenses advanced from

August 26, 1995, through January 25, 2000.

The Plan Committee objects to A&D's Fee Application. The Plan Committee contends that, from the beginning of this case, A&D has had an irreconcilable conflict of interest because Debtor's counsel also represented the bankruptcy estate of Antonio Ferrari, who was both the sole stockholder of the Debtor and, for a time, Debtor's purported largest creditor. Notwithstanding detailed and persistent requests from The Plan Committee to acknowledge the conflict and take steps to rectify it, A&D refused to promptly do so. Consequently, A&D's forbearance resulted in significant additional expense to the estate which The Plan Committee estimates at more than $25,000.

The Plan Committee further contends that A&D refused to promptly acknowledge that Mr. Ferrari's $2,000,000 claim filed in this case was invalid. Ultimately, in April, 1996, Mr. Ferrari's claim was denied, but not before substantial time and expenses were incurred which would have been unnecessary were it not for A&D's conflict of interest and divided loyalty.

The Bankruptcy Code imposes strict conflict of interest restraints upon the employment of professional persons in a bankruptcy proceeding:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys...that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327(a). *See also* 11 U.S.C. § 1107(a) (§327(a) applies to counsel representing a debtor in possession under Chapter 11).

The statutory requirements of disinterestedness and no interest adverse to the estate ensure that all professionals appointed pursuant to § 327(a) tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities. The need for professionals to avoid conflicts of interest does not end upon appointment; it continues throughout their tenure. *See* 11 U.S.C. § 328(c).

Judge Squires has observed that "[r]epresentation of more than one person or entity in a matter which ends up in bankruptcy court is fraught with ethical quagmires for even the most experienced professional." In re Grabill Corp., 113 B.R. 966, 969 (Bankr. N.D. Ill. 1990), *aff'd* 135 B.R. 835 (N.D. Ill. 1991), *aff'd* 983 F.2d 773 (7th Cir. 1993). Many courts have found a conflict of interest when an attorney represents both the corporate debtor and the debtor's shareholders. In re Rusty Jones, Inc., 134 B.R. 321, 343 (Bankr. N.D. Ill. 1991) (citations omitted). The instant case is illustrative of the types of problems encountered by the simultaneous representation of both a debtor and a debtor's major shareholder.

The Court has the authority to deny fees in their entirety if it determines at any time during the course of representation that a conflict of interest exists. *See* In re Inslaw, Inc., 97 B.R. 685, 703 (Bankr. D. D.C. 1989). This is so even though the services rendered had intrinsic value and brought a benefit to the bankruptcy estate. In re Churchfield Management & Investment Corp., 100 B.R. 389, 394 (Bankr. N.D. Ill. 1989) (citations

omitted). Notwithstanding a conflict of interest, the court also has the equitable power to award a portion of the fees requested if mitigating factors are present. Id.

At the time this Court entered its Order appointing A&D counsel for Debtor on November 14, 1994, the Court was aware of the potential conflict of interest issue and the parties' respective positions. At that time, A&D had already withdrawn from its representation of Mr. Ferrari. Apparently the Court was reasonably satisfied that the conflict of interest issue was sufficiently resolved at that time and that A&D was qualified to represent Debtor in the Chapter 11 proceeding. This Court's review of A&D's representation of the Debtor in these proceedings indicates that A&D did provide some compensable services to the estate. However, the Court also finds merit in The Plan Committee's contention that A&D's failure to immediately acknowledge the conflict and take prompt steps to rectify it resulted in significant additional expense to the estate. Accordingly, the Court will take these factors into consideration in evaluating the reasonableness of the fees being sought.

The criteria for evaluating fee applications in bankruptcy cases is set forth in Bankruptcy Code Section 330(a)(3), which states as follows:

> (3) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;

> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
>
> (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. §330(a)(3).

The Court has a duty to examine independently the reasonableness of fees requested. In re Price, 143 B.R. 190, 192 (Bankr. N.D. Ill. 1992) *aff'd* 176 B.R. 807, *aff'd and remanded* 42 F.3d 1068 (7th Cir. 1994); In re Wyslak, 94 B.R. 540, 541 (Bankr. N.D. Ill. 1988); In re Chicago Lutheran Hospital Association, 89 B.R. 719, 734-35 (Bankr. N.D. Ill. 1988). The lack of an objection to a fee request does not restrict the Court from limiting the fees sought. In re Lee, 209 B.R. 708, 710 (Bankr. N.D. Ill. 1997). The burden of proof to show entitlement to the fees requested is on the applicant. *See* In re Kenneth Leventhal & Co., 19 F.3d 1174, 1177 (7th Cir. 1994); In re Price, *supra*, 143 B.R. *at* 192; In re Stoecker, 114 B.R. 965, 969 (Bankr. N.D. Ill. 1990); In re Thorn, 192 B.R. 52, 55 (Bankr. N.D. N.Y. 1995). This burden must "not be taken lightly, especially given that every dollar expended on legal fees results in a dollar less that is available for distribution to the creditors." In re Pettibone Corp., 74 B.R. 293, 299 (Bankr. N.D. Ill. 1987).

In assessing the reasonableness of a requested fee, this Court

(and the vast majority of others) continues to utilize the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), which are:

1. The time and labor required;
2. The novelty and difficulty of the question;
3. The skill necessary to perform the legal services properly;
4. The preclusion of other employment by the attorney due to acceptance of the case;
5. The customary fee for similar work in the community;
6. Whether the fee is fixed or contingent;
7. Time limitations imposed by the client or the circumstances;
8. The amounts involved and the results obtained;
9. The experience, reputation, and ability of the attorneys;
10. The "undesirability" of the case;
11. The nature and length of the professional relationship with the client; and
12. Awards in similar cases.

Id. *at* 717-19. *See also* In re East Peoria Hotel Corp., 145 B.R. 956, 962-63 (Bankr. C.D. Ill. 1991) (although the Johnson factors, the "lodestar" approach and §330 are not identically termed, there is a sense of harmony between them and a court need not pick one over the others. The end result would be the same, whatever approach was applied.)

To address the unique features of a bankruptcy case, two additional factors should also be considered in the determination of a reasonable fee: (i) value to the estate, and (ii) the effect on the creditors. In re Vista Foods USA, Inc., 234 B.R. 121, 131

(Bankr. W.D. Okla. 1999). If the attorney requesting compensation represents the trustee or debtor-in-possession, compensation will, generally, not be allowed unless the services resulted in a benefit to the estate. Id. *at* 130 (citations omitted).

Services which are found to be excessive, redundant, or unnecessary are not compensable. Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939-40 (1983). Reasonable time spent does not necessarily include all time actually expended. *See* In re Chas. A. Stevens & Co., 105 B.R. 866, 870-71 (Bankr. N.D. Ill. 1989). In determining what constitutes reasonable compensation, the Seventh Circuit has stated that "there are limits -- measured by standards of reasonableness -- to what a professional can demand in a bankruptcy case." In re Kenneth Leventhal & Co., *supra*, 19 F.3d *at* 1178. The Court may determine what is the reasonable amount of time a professional should have to spend on a given project. In re Wildman, 72 B.R. 700, 713 (Bankr. N.D. Ill. 1987) *citing* In re Shades of Beauty, Inc., 56 B.R. 946, 951 (Bankr. E.D. N.Y. 1986), *aff'd in part, remanded in part*, 95 B.R. 17 (E.D. N.Y. 1988).

The itemization attached to A&D's Fee Application indicate that 1,014.30 hours were expended at hourly rates ranging from $45.00 to $50.00 per hour for law clerks, $135.00 to $200.00 per hour for associates, and $160.00 to $225.00 per hour for Mr. Deignan, a partner in A&D. The fees requested total $142,307.00 in addition to the $125,000.00 already awarded.

It cannot be disputed that a great deal of time and labor was

expended by A&D in this case. This was a fairly complex Chapter 11 case, and A&D brought skilled and experienced personnel to the task of representing the Debtor herein. Because this case was initiated as an involuntary Chapter 7 proceeding, A&D was required in at least the initial stages of this case to move quickly. There is no evidence, however, that A&D was precluded from other employment due to acceptance of the case or that the case was particularly "undesirable", nor was there any evidence that A&D had a lengthy professional relationship with the Debtor prior to representing it in this case. It would be difficult to accurately estimate a "customary fee" for representing the Debtor in this case, although, for reasons stated below, the Court finds that A&D did not always perform as efficiently as it should have. Based upon its experience over the years, the Court would generally expect to find attorney fee awards in similar cases to be substantially less than the amounts being requested herein.

As indicated above, the Plan Committee estimates that A&D's failure to acknowledge and take steps to resolve the conflict of interest resulting from A&D's representation of both the Debtor and Mr. Ferrari in their respective bankruptcy proceedings resulted in additional expenses to the estate in excess of $25,000. In addition, The Plan Committee contends that A&D's refusal to acknowledge the invalidity of Mr. Ferrari's $2,000,000 claim filed in this case cost the estate substantial time and expense. The Court agrees with The Plan Committee that A&D continued to maintain an untenable position that it could represent Mr. Ferrari and the Debtor long after the existence of a clear conflict of interest

became undeniable. A&D's acts and omissions from that time forward cost the estate substantially, and certainly these actions should not be rewarded.

From the beginning, this case was one of those Chapter 11 cases which the Court occasionally sees where there appears to be little if any realistic hope that a successful reorganization can be affected. Yet, in spite of an objectively hopeless prognosis, the patient is kept on life support, allowing enormous amounts of attorneys fees to be incurred, yet resulting in virtually no benefit to the Debtor, the bankruptcy estate, or the unsecured creditors.

The Court has found A&D's manner of representation of the Debtor in these proceedings to have been very contentious, litigious, and not particularly efficient. A&D seized the opportunity to file an objection to virtually every motion filed by a creditor or by The Plan Committee. In many cases, the objections were without merit and almost always either overruled by the Court or withdrawn by A&D.

In examining the individual itemizations provided by each of the attorneys or law clerks who worked on the case, the Court finds a number of entries to be problematic. For example, much of the time billed by law clerk Ed R. Cardoza is non-compensable. Based upon his time entries, Mr. Cardoza spent a great deal of doing research, apparently to educate himself in bankruptcy law in general and on the facts of this case specifically. He also spent a great deal of time in conference with Mr. Deignan - time for which the Debtor was billed. However, based upon the itemization,

it does not appear that Mr. Cardoza performed many substantial or meaningful services of benefit to the Debtor, the estate, or the unsecured creditors.

The Court also notes that there appears to be a great deal of duplication in the efforts of Attorney Paula Cardoza and Attorney Paul Deignan. There are numerous entries for conferences between Ms. Cardoza and Mr. Deignan and for meetings at which both were present. For example, Ms. Cardoza and Mr. Deignan both logged time on 11/7/95, 11/14/95, 1/10/96, 1/11/96, 1/17/96, 1/18/96, 1/19/96, 1/21/96, and 2/5/96 for conferences between Ms. Cardoza and Mr. Deignan, or conferences with others at which both Ms. Cardoza and Mr. Deignan were present. For most intraoffice conferences, only one attorney should be compensated for her or his time. *See* In re Adventist Living Centers, Inc., 137 B.R. 701, 717 (Bankr. N.D. Ill. 1991). Conferences with third parties at which two attorneys were present should be billed by only one attorney unless it can be shown that the presence of both attorneys was necessary. In re Pothoven, 84 B.R. 579, 585 (Bankr. S.D. Iowa 1988) (citations omitted).

Mr. Deignan billed $1,960.00 for preparation of the first fee application and attendance at the hearing on the fee application. This Court agrees with the line of cases which hold that time spent preparing and presenting a fee application is not a "benefit to the estate" and is, therefore, not compensable. *See* In re Junco, Inc., 185 B.R. 215, 218 (Bankr. E.D. Va. 1995); In re Jefsaba, Inc., 172 B.R. 786, 801-02 (Bankr. E.D. Pa. 1994); In re Courson, 138 B.R.

928, 932-36 (Bankr. N.D. Iowa 1992); In re The Vogue, Inc., 92 B.R. 717, 720-21 (Bankr. E.D. Mich. 1988); In re Wiedau's, Inc. 78 B.R. 904, 909 (Bankr. S.D. Ill. 1987); In re Wilson Foods Corp., 36 B.R. 317, 323 (Bankr. W.D. Okla. 1984).

Based upon a thorough review the itemizations attached to the Fee Application, and for the reasons set forth above, the Court finds that A&D should be awarded fees in the amount of $97,500.00. The remaining $44,807.00 in fees requested are denied.

A&D also request reimbursement for expenses in the amount of $9,556.40. This includes 16,035 photocopies at a rate of $.30 per copy, and 471 photocopies at a rate of $.25 per copy. Many courts do not permit reimbursement for in-house photocopying or postage as these expenses are considered overhead. *See* In re Miami Optical Export, Inc., 101 B.R. 383, 385 (Bankr. S.D. Fla. 1989). In this circuit, however, most courts do allow reimbursement for reasonable in-house photocopying charges. The maximum rate allowed by most courts in this circuit for in-house copying charges does not exceed $.20. *See* In re Caribou Partnership III, 152 B.R. 733, 740 (Bankr. N.D. Ind. 1993) ($.20 per page); In re Churchfield Management & Investment Corp., 98 B.R. 838, 860 (Bankr. N.D. Ill. 1989) ($.15 per page or less); In re Trak Microcomputer Corp., 58 B.R. 708, 713-14 (Bankr. N.D. Ill. 1986) ($.15 per page). The Court will allow A&D's request for reimbursement for in-house photocopying at the rate of $.20 per page. This adjustment will reduce A&D's allowed expenses by $1,627.05. The remainder of A&D's request for reimbursement will be allowed.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

ENTERED:

_____
LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE

xc: Paul T. Deignan
1770 Market Square Center
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Indianapolis, IN 46204

U.S. Trustee
101 W. Ohio St. #1000
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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF INDIANA

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EUROMOTORSPORT RACING, INC.	)	
	)	Case No. 94-04503-RLB-11
Debtor.	)	

O R D ER

For the reasons set forth in an Opinion entered this day,

IT IS HEREBY ORDERED that Ancel & Dunlap's Final Application for Allowance of Compensation and Reimbursement of Expenses as Attorneys for Debtor be and is hereby granted in the sum of $97,500 in fees and $7,928.35 in expenses. The remaining $44,807.00 in fees and $1,627.05 in expenses requested by Ancel & Dunlap be and are hereby denied.

ENTERED:

_____

LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE

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